(1)
Supreme Court, U.S.
FILED
No. 01 540 SEP 27 2001

IN THE

Supreme Court of the United States

CITY OF BOGUE, KANSAS
and CITY OF HILL CITY, KANSAS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY E. WELCH, ESQ.
Counsel of Record
HILL & WELCH
1330 New Hampshire Avenue, N.W.
Suite 113
Washington, D.C. 20036
(202) 775-0070

Counsel for Petitioners

September 27, 2001

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

127 pp

I. QUESTION PRESENTED FOR REVIEW

Whether after five years of litigation Petitioners are denied Eleventh Amendment Sovereign Immunity and Fifth Amendment Due Process and Equal Protection by dismissal on mootness grounds of their constitutional claims challenging 47 U.S.C. § 253 and FCC rules which compel Petitioners, as arms of a state, to appear before the FCC to defend against suits filed by private parties, which require them to comply with federal orders directing them to take action in furtherance of Federal regulatory objectives, which determine that the FCC may regulate local governmental decisions "whether or not such legal requirements affect interstate telecommunications services," and which determine that the FCC has authority to conduct enforcement proceedings against them even though they do not hold FCC authorizations, where the dismissal is predicated on the FCC's post-appeal vacatur of the challenged orders, but where Petitioners nevertheless remain bound to comply with § 253.

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, The City of Bogue, Kansas, is a municipality located in Kansas. There are no parent or affiliated companies.

2. Petitioner, The City of Hill City, Kansas, is a municipality located in Kansas. There are no parent or affiliated companies.

3. Respondents, Federal Communications Commission and the United States of America.

4. Intervenors below: Classic Telephone, Inc., AT&T Corp., Association for Local Telecommunications Services, National Cable Television Association, Inc., US WEST, Inc., Teleport Communications Group, Inc., Telecommunications Resellers Association, MCI Telecommunications Corporation.

III. TABLE OF CONTENTS

I. QUESTION PRESENTED FOR REVIEW i

II. LIST OF PARTIES TO THE PROCEEDING ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES v
- Constitutional Provision v
- Statutory Provisions v
- Court Rules v
- Cases vi
- Administrative Actions viii

V. OPINIONS AND ORDERS BELOW 1

VI. JURISDICTIONAL STATEMENT 1

VII. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS CITED 2

VIII. STATEMENT OF THE CASE 2
- A. Statement of Facts 2
- B. The Preemption and Enforcement Decisions ... 5
- C. The Court of Appeals Decisions 7

IX. ARGUMENT–Vacatur Cannot Cause Mootness 8
- A. The Circuit Court's Sole Reliance Upon *United States v. Chrysler* is Misplaced 8
- B. *City of Erie v. Pap's A.M., TDBA "Kandyland"* Controls The Mootness Question 10
  - 1. Classic's Exit Does Not Moot The Cities' Claims 10

2. Vacatur Does Absolve The Cities From Complying with § 253 15
3. Injuries to The Cities 17
C. The FCC's Selective Use of Vacatur 20

X. CONCLUSION 22

APPENDIX

1. *City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*)..... .....1a

2. *Classic Telephone, Inc.*, 11 FCC Rcd. 13082 (FCC 1996) (*Preemption Order*).....3a

3. *Classic Telephone, Inc.*, 12 FCC Rcd. 15619 (FCC 1997) (*Enforcement Order*).....44a

4. *Classic Telephone, Inc.*, 14 FCC Rcd. 960 (Pol. Prog. Plan. Div. 1999) (*Enforcement Termination Order*).....73a

5. *Classic Telephone, Inc.*, 14 FCC Rcd. 19974 (FCC 1999) (*Reconsideration Order*).....75a

6. *Classic Telephone, Inc.*, 15 FCC Rcd. 25101 (FCC 2000) (*Vacating Order*).....78a

7. *City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*)..... .....80a

8. Texts of Statutes and Regulations.....81a

IV. TABLE OF AUTHORITIES[1]

Constitutional Provision

U.S. Const. Amend. V ..... i, 20

U.S. Const. Amend. XI ..... i, 18-20, 23

Statutory Provisions

5 U.S.C. § 702 ..... 2, 8

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2341 *et seq.* 8

28 U.S.C. § 2343 8

28 U.S.C. § 2344 8

47 U.S.C. § 151, *et seq.* 8

47 U.S.C. § 253 ..... i, 4, 7, 8, 12, 14-23

47 U.S.C. § 402(a) 8

47 U.S.C. § 402(j) 2

Kan. Stat. Ann. 12-2001 ..... 3, 19

Court Rules

Circuit Rule 35(a) 1

---

[1] All citations to statutes and regulations are to the current version unless noted otherwise.

Handbook of Practice and Internal Procedures, D.C. Cir., January 3, 2000 2

Supreme Court Rule 13.1 2

Supreme Court Rule 13.3 2

Cases

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) 13

Alden v. Maine, 527 U.S. 706 (1999) 17-19, 22

Board of Trustees of the University of Alabama, et al., v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001) 19

Calderon v. Moore, 518 U.S. 149 (1996) 9

Canfield v. City of Oklahoma, 248 F.3d 1214 (10th Cir. 2001) 16

Charles v. Daley, 749 F.2d 452 (7th Cir. 1984) 15

City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 121 S.Ct. 743 (2001) 15

City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*) 1, 8, 14

City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*) 1, 2, 8

City of Erie v. Pap's A.M., TDBA "Kandyland," 529 U.S. 277 (2000) 10, 11, 13, 14, 17, 20

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301 (11th Cir. 2000) 16

Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) 13

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 18

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4

Jones v. Washington Metropolitan Area Transit Authority, 205 F.3d 428 (D.C. Cir. 2000) 19

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 19

Lincoln County v. Luning, 133 U.S. 529 (1890) 19

Lopez v. United States, 514 U.S. 549 (1995) 22

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 22

Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995) 20

Mills v. Green, 159 U.S. 651 (1895) 9

New York v. United States, 505 U.S. 144 (1992) .. 15, 19, 22

Northwest Pipeline Corporation v. FERC, 863 F.2d 73 (D.C. Cir. 1988) 20

Prayze FM v. FCC, 214 F.3d 245 (2nd Cir. 2000) .. 9, 10, 17

Printz v. United States, 521 U.S. 898 (1997) 15, 22

RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th Cir. 2000) 12, 17, 21

Sable Communications of California, Inc., 827 F.2d 640 (9th Cir. 1987) 10, 17

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) 13

United States v Chrysler Corp., 158 F.3d 1530 (D.C. Cir. 1998) 8-10, 17

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) . 13

United Tel. Co. of Kansas v. City of Hill City, 258 Kan. 208, 899 P.2d 489 (Kan. 1995) 3, 19

Administrative Actions

American Communications Services, Inc.; MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended, 14 FCC Rcd. 21579 (FCC 1999) 12

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Sec. 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, 14 FCC Rcd. 11064 (FCC 1999) 12

Classic Telephone, Inc., 11 FCC Rcd. 13082 (FCC 1996) (*Preemption Order*) 1, 3, 5, 7, 8, 10, 13, 14, 19, 22

Classic Telephone, Inc., 12 FCC Rcd. 15619 (FCC 1997) (*Enforcement Order*) 1, 6-8, 13, 14, 16

Classic Telephone, Inc., 14 FCC Rcd. 19974 (FCC 1999) (*Enforcement Reconsideration Order*) 1, 7, 8

Classic Telephone, Inc., 14 FCC Rcd. 960 (Pol. Prog. Plan. Div. 1999) (*Enforcement Termination Order*) ... 1, 7, 8, 12

Classic Telephone, Inc., 15 FCC Rcd. 25101 (FCC 2000) (*Vacatur Order*) 1, 7, 12, 15, 23

Public Notice, 11 FCC Rcd. 22506 (1996) (December 13, 1996) 6, 10

TCI Cablevision of Oakland County, Inc., 12 FCC Rcd. 21396 (FCC 1997) 12, 16, 21

The Missouri Municipal League, 16 FCC Rcd. 1157 (FCC 2001) 16

Western Wireless Corporation, Memorandum Opinion and Order, 15 FCC Rcd. 16227 (FCC 2000) 12, 17, 21

V. OPINIONS AND ORDERS BELOW

1. *Classic Telephone, Inc.*, 11 FCC Rcd. 13082 (FCC 1996) (*Preemption Order*), *appeal dismissed, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*), *r'hrng denied, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*).

2. *Classic Telephone, Inc.*, 12 FCC Rcd. 15619 (FCC 1997) (*Enforcement Order*), *proceeding terminated, Classic Telephone, Inc.*, 14 FCC Rcd. 960 (Policy and Program Planning Div. 1999) (*Enforcement Termination Order*); *recon. denied, Classic Telephone, Inc.*, 14 FCC Rcd. 19974 (FCC 1999) (*Enforcement Reconsideration Order*), *appeal dismissed, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*), *r'hrng denied, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*).

3. *Classic Telephone, Inc.*, 15 FCC Rcd. 25101 (FCC 2000) (*Vacatur Order*), pet. for recon. pending.

VI. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the District of Columbia Circuit filed its *Dismissal Order* in this case on March 15, 2000.[1] On April 26, 2001, within 45 days as required by Circuit Rule 35(a), Petitioner timely filed a petition for *en banc* rehearing which was denied by the *Rehearing*

---

[1] Reprinted Apdx. 1a.

Denial Order filed June 29, 2001.[2] Pursuant to Supreme Court Rules 13.1 and 13.3, the instant petition is timely filed within 90 days of the issuance of the June 29, 2001 *Rehearing Denial Order*.[3] The 90th calendar day after June 29, 2001 is Thursday, September 27, 2001. Subject matter jurisdiction arises under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j).

VII. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS CITED[4]

U.S. Const. Amend. V; U.S. Const. Amend. XI; 5 U.S.C. § 702 Right of review; 28 U.S.C. § 1254(1), Courts of appeals; certiorari; 28 U.S.C. § 2343, Venue; 28 U.S.C. § 2344, Review of Orders; Time; 47 U.S.C. § 253, Removal of Barriers to Entry; 47 U.S.C. § 402, Judicial review of Commission's orders and decisions; Kan. Stat. Ann. 12-2001, Franchises.

VIII. STATEMENT OF THE CASE

A. Statement of Facts

The Cities are municipalities located in the State of Kansas. Bogue has a population of less than 200 persons, Bogue's *Comments Opposing Petition*, at 1, and Hill City has a population of less than 2,000. Hill City's *Opposition to Petition for Preemption*, at 3. Bogue and Hill City are referred to herein as "The Cities" or "Petitioners."

The Kansas Corporation Commission (KCC) is authorized to issue certificates of convenience and necessity to telephone exchange companies. However, a certificate holder cannot provide service in a community until it receives a

---

[2] Reprinted Apdx. 80a.

[3] For purposes of seeking *certiorari* the D.C. Circuit has determined that "a timely petition for rehearing or rehearing *en banc* extends the time for petitioning the United States Supreme Court for a writ of *certiorari*." Handbook of Practice and Internal Procedures, January 3, 2000, at 55.

[4] All citations to statutes and regulations are to the current version unless noted otherwise. Texts are provided in the Appendix

franchise from that community. The KCC's issuance of a certificate of convenience and necessity does not require a community to issue a local telephone exchange franchise to the certificate holder. *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 221, 899 P.2d 489 (Kan. 1995). The State of Kansas has ceded the power to issue telephone exchange franchises to The Cities and The Cities exercise the sovereign state police power to act upon telephone exchange franchise applications. Kan. Stat. Ann. 12-2001; Apdx. 86a; *Preemption Order* 11 FCC Rcd. at 13100-01 ¶ 34; Apdx. 30a-32a; Bogue's *Comments Opposing Petition*, at 2 n. 3; Bogue's *Reply Comments Opposing Preemption*, at 6. Only after a company receives both state and local approval may an entity provide critical lifeline telephone exchange service.

In 1993 The Cities terminated the telephone exchange franchises of Sprint-United Telephone Company for being inadequate. These decisions were ultimately affirmed by the Kansas Supreme Court as being reasonable exercises of franchising power. *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 223 899 P.2d 489 (Kan. 1995); *Preemption Order*, 11 FCC Rcd. 13084-85; ¶¶ 3-4; Apdx 4a-6a. In May 1995, while *United Tel. Co. of Kansas v. City of Hill City* was pending in the Kansas Supreme Court, Classic applied to The Cities for local telephone exchange franchises. *See* Classic's March 19, 1996 *Petition for Preemption*, at Exhibit 3 & Exhibit 5 (letters to The Cities' attorneys from Classic's counsel); Classic proposed to acquire and to operate the Sprint-United telephone facilities which had already been found inadequate and which The Cities had already determined would not continue to be franchised. Even after the Kansas Supreme Court determined that The Cities had the authority to terminate Sprint-United's exchange franchises, Classic continued to propose using those facilities while promising to improve the facilities. *See* Classic's *Petition for Preemption*, at Exhibit 6 (July 25, 1995 letter from Classic's attorney to Bogue's

attorney stating continued intent to acquire Sprint-United facilities).

§ 253 (b) does not, on its face, preempt local telephone exchange franchising authority. To the contrary, § 253(b) is a "plain statement" explicitly authorizes state franchising authority by providing that states should continue, *inter alia*, to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[5] Utilizing long held telephone franchising powers, The Cities denied telephone franchises to Classic for a variety of reasons, including Classic's proposal to acquire and to operate facilities which The Cities had already determined were "highly inadequate." *See* Bogue's *Comments Opposing Petition*, at 6-7; Hill City's *Opposition to Petition for Preemption*, at 1, 4, 19. The Cities reminded the FCC that "telephone exchange service is an essential communications link relied upon to reach fire, police, and emergency medical services." *See* Bogue's *Comments Opposing Petition*, at 9; Hill City's *Opposition to Petition for Preemption*, at 10. The Cities were also very concerned that Classic's failure to provide financial information prevented The Cities from determining whether Classic could be relied upon to be a provider of lifeline

---

[5] In order to constitute a valid preemption of state authority a federal statute must contain a "plain statement" that Federal preemption is intended. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Rather than containing a plain preemption statement, the "plain statement" contained in § 253(b) provides that states retain the authority "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 33-34 & n. 22. It is important that there is no meaningful "opt out" option for states by which the Federal Government would assume the responsibility of issuing franchises in each of the thousands of communities across the country. The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 39-40 citing *Petersburg Cellular Partnership*, 205 F.3d 688, 700 (4th Cir. 2000) (*per curium*) (Niemeyer, J. concurring).

services. *See* Bogue's *Comments Opposing Petition*, at 8-10; Hill City's *Opposition to Petition for Preemption*, at 11, 20.

The Cities subsequently denied Classic's February 14, 1996, requests for reconsideration which Classic had filed after passage of the Telecommunications Act of 1996. *Preemption Order*, at ¶ 8, Apdx. 9a-10a and Classic filed its March 1996 preemption petition with the FCC. On April 8, 1996 Classic filed a civil suit against The Cities seeking more than $80 million for alleged state and federal antitrust violations, attorneys' fees, and other perceived injuries. Classic's claims against The Cities were dismissed by the United States District Court for the District of Kansas in orders issued December 4, 1996 and January 22, 1998. Case No. 96-2166-DES.

B. The Preemption and Enforcement Decisions

Approximately five years ago Classic filed a case with the FCC against The Cities to determine whether The Cities' exercise of their police powers in denying local telephone exchange franchises to Classic Telephone, Inc. (Classic) should be preempted. In the complete absence of any rules or prior decisions, the FCC determined that The Cities' franchise denials violated 47 U.S.C. § 253 and the FCC ordered The Cities to reconsider their decisions consistent with the FCC's directions. *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50; Apdx. 42a-43a. The Cities disagreed with the Commission's factual determinations, but more importantly, The Cities disagreed with the Commission's determination that it had the constitutional authority to call them before it to defend themselves against a suit filed by a private party, to regulate their exercise of police powers, and to direct them to regulate interstate commerce in a prescribed manner. Consequently, The Cities filed No. 96-1432.

Despite the pendency of No. 96-1432, the FCC, at Classic's request, commenced an enforcement action against The Cities to determine whether The Cities had violated the Communications Act or the *Preemption Order*. *See* FCC's

December 13, 1996 *Public Notice*, 11 FCC Rcd. 22506 (1996) instituting a public enforcement proceeding to determine whether the FCC should

> (1) Enjoin the Cities from interfering with Classic's provision of telecommunications services; (2) Find that the Cities' inaction justifies the issuance of an order granting Classic a franchise and all other necessary authority for Classic to engage in the provision of intrastate telecommunications service within the Cities; (3) Impose sanctions on the Cities, including but not limited to attorneys fees and costs; (4) Notify the Cities of their apparently willful violation of Section 253 of the Communications Act and the Commission's Order in this proceeding and assess a forfeiture in an amount to be determined pursuant to Title V and the Commission's rules and regulations; (5) Direct the Cities to show cause why the Commission should not initiate further proceedings to assess additional forfeitures, in an amount to be determined, for each day that violations of the 1996 Act and the Commission's Order in this proceeding continue after the Commission's release of its Notice of Apparent Liability; and (6) Any other and all such relief as the Commission may deem appropriate.

Over The Cities objection, the Court permitted the FCC to proceed with the enforcement action, but the Court held Case No. 96-1432 in abeyance pending a final FCC order in the enforcement case. *See* January 14, 1997 *Order*, No. 96-1432. The enforcement proceeding lasted for nearly three years, through the issuance of the *Enforcement Order*. Some time after the FCC issued the *Enforcement Order* Classic advised the FCC that it no longer intended to provide local telephone exchange service in The Cities. Based upon Classic's statement of intent not to serve The Cities, the FCC thereafter dismissed The Cities' reconsideration of the enforcement

action. *Enforcement Termination Order*, 14 FCC Rcd. 960; Apdx. 73a; *Enforcement Reconsideration Order*, 14 FCC Rcd. 19974; Apdx. 75a. The Cities filed Case No. 99-1521 to seek review of the FCC's handling of the enforcement proceeding.

On September 27, 2000 The Cities filed their *Initial Brief*, in Nos. 96-1432, 99-1521. A few days later, on October 5, 2000, the FCC filed a *Motion to Defer Briefing Schedule* which argued that the FCC was considering vacating the challenged orders and that there was a "likely prospect that the Commission will adopt the staff's recommendation [to vacate the challenged orders] and thereby moot this case" *Motion to Defer Briefing Schedule*, at 1.[6] The Court granted the FCC's *Motion to Defer Briefing Schedule* over The Cities' opposition. The FCC subsequently vacated the challenged orders without seeking public comment. *Vacatur Order*, 15 FCC Rcd. 25101; Apdx. 78a. The Cities thereafter filed a petition for reconsideration of the *Vacatur Order* seeking exemption from the requirements of 47 U.S.C. § 253. On January 4, 2001 the FCC advised the D.C. Circuit that the FCC could not exempt The Cities from § 253. *See* FCC's January 4, 2001 *Reply to Petitioners' Response to Motion to Dismiss and FCC's Opposition to Petitioners' Motion to Defer Ruling*, at 2.

C. The Court of Appeals Decisions

This proceeding seeks review of the circuit court's dismissal of Petitioners' challenges to several FCC orders in a local telecommunications regulation preemption case and in a related enforcement case purportedly conducted pursuant to the

---

[6] The FCC also advised the Court that "if the Commission adopts the staff's recommendation, this case will become moot. Given the likelihood that the Commission will soon take action that will render this case moot, we respectfully ask the Court to suspend briefing in this case pending FCC action on the staff's recommendation to vacate the *Preemption Order* and the *Order Denying Relief* [the *Enforcement Order*]." *Motion to Defer Briefing Schedule*, at 2.

Communications Act, as amended, 47 U.S.C. §151, *et seq.* Appellate review of the FCC's orders are authorized by the Communications Act, 47 U.S.C. §402(a), the Administrative Procedure Act, 5 U.S.C. § 702, and the Judicial Review Act of 1950, 28 U.S.C. § 2341 *et seq.* Venue was proper in the D.C. Circuit pursuant 28 U.S.C. § 2343.

The FCC's *Preemption Order*, 11 FCC Rcd. 13082 (1996) was released on October 1, 1996 and No. 96-1432 was timely filed on November 22, 1996, within the 60 day period required by 28 U.S.C. § 2344. The FCC's *Enforcement Reconsideration Order*, 14 FCC Rcd. 19974 (FCC 1999) was released on November 23, 1999 and No. 99-1521 was timely filed on December 13, 1999, within the 60 day period required by 28 U.S.C. § 2344. The *Enforcement Reconsideration Order* affirmed the staff's January 13, 1999 *Enforcement Termination Order*, 14 FCC Rcd. 960 (1999), which terminated the enforcement proceeding, but which left the *Enforcement Order*, 12 FCC Rcd. 15619 (1997) standing. While the circuit court required briefing on the issue of whether the *Enforcement Order* was properly before the court, *see Order*, released March 22, 2000; Petitioners' *Brief*, at 10-15, neither the *Dismissal Order* nor the *Rehearing Denial Order* rely upon this issue as supporting dismissal of 99-1521. Because that issue was not decided below, it is not argued instantly. In any event, the circuit court's jurisdictional concern expressed in its March 22, 2000 *Order* relates only to the *Enforcement Order* at issue No. 99-1521, the concern does not extend to No. 96-1432 and the *Preemption Order* which is at the heart of the constitutional challenges to § 253.

IX. ARGUMENT–Vacatur Cannot Cause Mootness

A. The Circuit Court's Sole Reliance Upon *United States v. Chrysler* is Misplaced

In dismissing the captioned action on mootness grounds the March 15, 2001 *Dismissal Order* relies solely upon *United States v Chrysler Corp.*, 158 F.3d 1530, 1353 (D.C. Cir. 1998)

(citing *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); Apdx. 1a. The circuit court had previously ordered that the parties discuss various issues and Supreme Court cases concerning, *inter alia*, standing, mootness and ripeness in their briefs. *See Order*, March 22, 2000, No. 96-1432.[7] *United States v. Chrysler* was not one of the cases about which the Court specifically requested comment and the parties did not discuss that case in their pleadings and the circuit court's orders do not discuss any cases cited in The Cities' *Initial Brief*.

The circuit court's reliance upon *United States v Chrysler* is misplaced. First, *United States v Chrysler* was not dismissed on mootness grounds and the case proceeded to a merits decision. Thus, *United States v Chrysler* does not support dismissal of this case on mootness grounds.

Second, *United States v Chrysler* determines that "even the availability of a 'partial remedy' is sufficient to prevent [a] case from being moot." *United States v Chrysler*, 158 F.3d at 1534. One of the injuries discussed in *United States v Chrysler* which could be remedied by a decision on the merits was that future monetary penalties might be sought from the automobile manufacturer "for the alleged violations of the Act." *Id.* The panel's March 15, 2001 *Order* does not discuss The Cities' argument that unless the instant case were decided on the merits, and because the FCC had denied The Cities request to be exempted from the requirements of § 253 of the Communications Act, The Cities could be subject to significant monetary forfeitures. *See* The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 3-4, where The Cities argued that denial of a request for statutory exemption provides standing, citing *Prayze FM v. FCC*, 214 F.3d 245, 251 (2nd Cir. 2000), and where The Cities argued that if there is the

---

[7] The Cities discussed these cases as directed by the circuit court in their *Initial Brief*, at 10-23.

possibility of a substantial monetary forfeiture the party does "not have to wait until it is actually prosecuted to challenge the statute." *Sable Communications of California, Inc.*, 827 F.2d 640, 643-44 (9th Cir. 1987). Thus, not only does the circuit court's own decision in *United States v Chrysler* hold that the possibility of future monetary penalties prevents a case from becoming moot, the circuit court's dismissal of the captioned case conflicts with the going forward rulings of the 2nd and 9th circuits in the *Prayze FM* and *Sable Communications* cases.

Third, *United States v Chrysler* involves a commercial safety dispute with no constitutional implications while the instant case involves fundamental questions concerning the Federal government's authority, or rather the lack of it, to require states governments to appear before it to stand trial for the exercise of police powers, which powers the FCC concedes are not part of a part of interstate commerce, *Preemption Order*, 11 FCC Rcd. 13094 ¶ 23; Apdx. 21a., and to enact and administer a Federal regulatory program upon pain of loss of local police power, forfeiture, and other penalties. *See* FCC's December 13, 1996 *Public Notice*, 11 FCC Rcd. 22506 (1996) (commencing an enforcement proceeding against The Cities).

B. *City of Erie v. Pap's A.M., TDBA "Kandyland"* Controls The Mootness Question

1. Classic's Exit Does Not Moot The Cities' Claims

The case which must be considered in determining mootness in this case is *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000). *See* The Cities' April 26, 2001 *Petition for Rehearing En Banc*, No. 96-1432, at 6-9; The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9-10; and The Cities' December 27, 2000 *Petition for Reconsideration* of the FCC's *Vacating Order*, at 4-5. In *City of Erie v. Pap's A.M., TDBA "Kandyland"* the local community had a regulation which prohibited public nudity. A local nude public dancing establishment, Kandyland, was successful in having the regulation declared unconstitu-

tional in the state court system. *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 286. After the Supreme Court granted cert to review the state court decision, the owner of Kandyland filed a motion to dismiss on mootness grounds because Kandyland was no longer an operating business. The Supreme Court rejected the mootness argument and decided the case on the merits. The Supreme Court determined that

> simply closing Kandyland is not sufficient to render the case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. . . . The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.

City of Erie v. Pap's A.M., TDBA "Kandyland," 529 U.S. at 287.

The instant case is on all fours with *City of Erie v. Pap's A.M., TDBA "Kandyland."* Like the situation in *Erie* the instant case "is not a run of the mill voluntary cessation case." 529 U.S. at 288. Classic prevailed at the FCC in the instant, precedent setting, preemption proceeding and The Cities' franchising denial decisions were overturned by the FCC and the matter was sent back to The Cities for reconsideration and implementation of the Federal regulatory plan. *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50; Apdx. 42a-43a. Thereafter, after The Cities had filed No. 96-1432 with the D.C. Circuit, and after the FCC had issued its *Enforcement Order*, but while the enforcement proceeding was still pending at the FCC on reconsideration, Classic provided the FCC with a statement that it did not intend to provide telecommunications service to The

Cities.[8] The FCC accepted Classic's statement at face value and terminated the enforcement reconsideration proceeding in 1999 via the *Enforcement Termination Order*, 14 FCC Rcd. 960; Apdx. 74a-75a, over The Cities' objection. *See Enforcement Reconsideration Order*, 14 FCC Rcd. 19974; Apdx. 75a-76a.

After having used the instant case of first impression as a springboard, the FCC subsequently issued multiple preemption orders and it has otherwise interpreted § 253's legal requirements.[9] After establishing the § 253 regime, and only after nearly five years of litigation, and only after The Cities' filed their appellate brief in Nos. 96-1432, 99-1521, did the FCC vacate the challenged orders in late 2000. The purpose served by the *Vacatur Order*, as the FCC explained to the

---

[8] It does not appear that Classic has withdrawn from Nos. 96-1432, 99-1521.

[9] For cases relying upon the instant case see, *see e.g.*, *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227 ¶ 10 n. 27 (FCC 2000); *American Communications Services, Inc.; MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, 14 FCC Rcd. 21579, 21587-88 ¶¶ 15, 16 n. 43 (FCC 1999); *AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Sec. 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd. 11064, 11072-73 ¶ 18 n. 49 (FCC 1999); *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, 12 FCC Rcd. 21396, 21438-39, 21441 ¶¶ 97, 103 & footnotes (FCC 1997); *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713, 19720-21 ¶ 17 n. 53 (FCC 1996); *see also RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (the court upheld the FCC's finding that the FCC can preempt a state regulation even if the case at the FCC has become moot).

circuit court in seeking to halt further briefing in Nos. 96-1432, 99-1521, was the "likely prospect that the Commission will adopt the staff's recommendation [to vacate the challenged orders] and thereby moot this case." FCC's October 5, 2000 *Motion to Defer Briefing Schedule*, at 1. The FCC further advised the circuit court that

> if the Commission adopts the staff's recommendation, this case will become moot. Given the likelihood that the Commission will soon take action that will render this case moot, we respectfully ask the Court to suspend briefing in this case pending FCC action on the staff's recommendation to vacate the *Preemption Order* and the *Order Denying Relief* [the *Enforcement Order*].

FCC's October 5, 2000 *Motion to Defer Briefing Schedule*, Nos. 96-1432, 99-1521, at 2.

Vacatur is a remedy applied to ensure that a party which is prevented from litigating due to extenuating circumstances is not bound by a non-appealable decision in the moot case. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur is not an administrative tool to be used to deny the opportunity to object to the FCC's regulatory program. It is clear that a party is not permitted to cause mootness such that the other party to the proceeding is prevented from litigating absent an "absolutely clear" showing that the problematic practice will not start up again. *See City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000); *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (party causing mootness has "heavy burden of persuading the court that the challenged

conduct cannot reasonably be expected to start up again" and the showing must be made with absolute clarity).[10]

This is not a case where the FCC sought to vacate the challenged orders after the case purportedly became moot. Indeed, the FCC's December 12, 2000 *Vacatur Order* was not even issued until after The Cities filed their *Initial Brief* in Nos. 96-1432, 99-1521 and not until nearly two years had elapsed from Classic's December 22, 1998, statement of non-intent to provide service. This is a case where the FCC seeks to make the case moot by vacating the challenged orders. While it may be axiomatic that if there is no case, the case is moot, the use of the vacatur power for the purpose of eliminating a case is a manipulation of Federal court jurisdiction which deprives The Cities of their right to attack the validity of § 253 as applied against them in a years long litigation.

The *Dismissal Order* finds the instant case moot in light of "Classic Telephone Company's decision not to provide telephone service to petitioners and the Federal Communications Commission's vacatur of the Preemption Order and Order Denying Relief . . ." *Dismissal Order*, at 1; Apdx. 1a. The *Dismissal Order* overlooks The Cities' argument that

> while Classic may have withdrawn its franchise applications, there is nothing which prevents it from resubmitting them to Petitioners at any time. Moreover, like the city in *City of Erie v. Pap's A.M., TDBA "Kandyland,"* Petitioners have an ongoing injury

---

[10] The *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50, Apdx. 42a-43a, and the *Enforcement Order*, 12 FCC Rcd. at 15634-35 ¶ 30, Apdx. 68a, indicate that The Cities' future conduct will be monitored by the FCC with regard to the FCC's findings. Because the eventuality of future proceedings is certain enough for the FCC to warn The Cities, it cannot be "absolutely clear" that the circumstance could never arise again. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 21-22. Moreover, as discussed below in Section IX.B.3., the objectionable practice has not even temporarily ended because The Cities are still required to comply with § 253.

> because § 253 prohibits Petitioners from utilizing their police powers to protect their citizens. *Id.* at 1390. At a minimum, the specter of § 253 regulation chills Petitioners' free exercise of their constitutionally protected police powers. *Cf. Charles v. Daley*, 749 F.2d 452, 460 (7th Cir. 1984 (chilling the exercise of a constitutional[ly] protected act is a cognizable injury)).

The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9-10; April 23, 2001 *Petition for Rehearing En Banc*, at 7-8. Because § 253 prevents The Cities from adopting a rule which prohibits service by unqualified service providers, and because The Cities must continue to comply with § 253, The Cities have a continuing interest in resolving the constitutional questions.[11]

2. Vacatur Does Absolve The Cities From Complying with § 253

The general rule is that a party is not permitted to temporarily alter questionable behavior to evade judicial review and voluntary cessation of a challenged practice rarely moots a federal case. *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 121 S.Ct. 743, 747 n. 1 (2001). Instantly, the *Vacatur Order* does not even temporarily remove the questionable behavior because The Cities remain bound to

---

[11] The Cities argued to the FCC that they could not be compelled to issue franchises to Charles Manson or a mob family. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 30-32. Who is qualified, and who is not qualified, to provide local service is a line drawing exercise. While the Federal government might choose to preempt completely, it has not done so here and § 253(b) explicitly authorizes the States to determine qualifications and the FCC cannot constitutionally order The Cities to use their franchise power to achieve a federally desire result. *See Printz v. United States*, 521 U.S. 898, 930 (1997); *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992) (Federal Government may not rely upon state actors to bear political burdens and expense of implementing a Federal program). The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 26.

comply with the requirements of § 253 as interpreted by the FCC. This is not a case in which a statute or regulation has been amended to remove the troublesome provision, *see e.g. Canfield v. City of Oklahoma*, 248 F.3d 1214, 1223 (10th Cir. 2001) (arguably overbroad language was deleted from statute during the pendency of the case and the case was thus rendered moot); *see also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000), and the instant case does not concern whether a prior version of § 253 is constitutional. § 253 and the FCC's requirements under the statute remain unaltered by the *Vacatur Order* and Petitioners remain bound to obey them or risk further Federal litigation and penalties.

The FCC determined below, in a case of first impression under § 253, that it had the authority to hear a suit filed by a private party against arms of the state, to stand in judgment of them concerning their exercise of their police powers in the face of a standardless § 253, and to issue remedial orders against The Cities to require them to enact a Federal regulatory program. The circuit court's orders fail to discuss The Cities' concern that "even though the FCC has vacated the *Preemption Order* and the *Enforcement Order*, the statutory prohibition on Petitioners' reasonable exclusion of market entrants and the FCC's review of police decisions remains intact." *See* The Cities' April 26, 2001 *Petition for Rehearing En Banc*, at 8; The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 6 citing *e.g. TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21440-43 ¶¶ 102-110 (FCC 1997) (holding at ¶ 103 that FCC does not condone a "third tier" of telecommunications regulation citing, *inter alia*, "the Classic Telephone Decision" and that local regulation is limited to managing rights of way, while ¶ 106 states that the FCC is very concerned where localities determine new entrant service conditions); *see also The Missouri Municipal League*, 16 FCC Rcd. 1157 (FCC

2001) (FCC still conducting § 253 preemption proceedings); *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (upholding the FCC's preemption in a case which had become moot); *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227, 16233 ¶ 13 (FCC 2000) (preempting a Kansas universal service fund statute which had been replaced by the time the FCC issued the order).

The Cities remain bound to follow the requirements of § 253, and the FCC's interpretations of it, therefore the case is not moot notwithstanding the FCC's selectively applied vacatur remedy. *See* Section IX.C. below. By subjecting The Cities to suit and by ordering them to issue orders for the purpose of achieving Federal objectives, § 253 and the FCC failed to accord The Cities "the esteem due to them as joint participants in a federal system." *Alden v. Maine*, 527 U.S. at 758.

3. Injuries to The Cities

In deciding mootness questions, the possibility of future adverse consequences is a test for determining whether an issue is moot. *See City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 287-88 (case not moot because Kandyland's owner could reopen); *Prayze FM v. FCC*, 214 F.3d at 251 (2nd Cir. 2000) (denial of a request for statutory exemption provides standing);[12] *United States v Chrysler*, 158 F.3d at 1534; (case not moot because there was the possibility of forfeiture); *Sable Communications of California, Inc.*, 827 F.2d at 643-44 (case not moot because there was the possibility of forfeiture). The possibility of future adverse action does not have to crystalize into a certitude in order to save a case from mootness and instantly the FCC plainly acknowledges the possibility of future proceedings. *See* The Cities' April 26, 2001 *Petition for*

---

[12] The Cities' interest in the requested denial implicates not only a concern about future consequences of having the statute applied against them, but also concerns a present denial of requested relief.

Rehearing, at 9 and the FCC's January 4, 2001 *Reply to Petitioner's Response to Motion to Dismiss and FCC's Opposition to Petitioners' Motion to Defer Ruling*, at 3 (the FCC advised the circuit court that if The Cities are ever placed in the position of having to defend themselves at the FCC again they can raise their arguments at that time, but in the meantime they will have to "'tailor their conduct' to comply with section 253 [when] they receive franchise applications from another entity seeking to provide competing local telephone service.").

Of course, the instant case does not concern only possible future injuries. Importantly, § 253 prevents, for example, The Cities from issuing franchising rules which would have the effect of excluding potential market entrants, such as on the grounds of felony convictions or a record of poor service elsewhere, because § 253 provides that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." (Emphasis added). Thus, even without considering the issue of future injuries, § 253 regulates The Cities' conduct today and "Petitioners have an ongoing injury because § 253 prohibits Petitioners from utilizing their police powers to protect their citizens." *See* The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 9-10; The Cities January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 10.

Moreover, The Cities' are entitled to vindicate their Eleventh Amendment Immunity Protection. It cannot be that The Cities must return to an improper Federal forum a second time at some point in the future, as the FCC suggests, in order to vindicate their constitutionally protected status. The Supreme Court has determined that "'it is not in the power of individuals to bring any State into court -- the State's or that of the United States -- except with its consent.'" *Alden v. Maine*, 527 U.S. at 746 citing *Great Northern Life Ins. Co. v. Read,*

322 U.S. at 59 (Frankfurter, J., dissenting); *see also Board of Trustees of the University of Alabama, et al., v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001) (11th Amendment protects states from suit by state employees for money damages brought under the Americans with Disabilities Act). The Cities are entitled to have decided in this case whether they compelled attendance at the FCC was constitutional.

The Cities are municipal corporations and, generally speaking, municipal corporations are not protected by the 11th Amendment. *Cf. Lincoln County v. Luning*, 133 U.S. 529 (1890). However, the State of Kansas has ceded The Cities the sovereign power to issue telephone exchange franchises. *Preemption Order*, 11 FCC Rcd. at 13101 ¶ 34; Apdx. 30a-32a; Kan. Stat. Ann. 12-2001; *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 221-223, 899 P.2d 489 (Kan. 1995) (local franchising decisions are binding upon the Kansas Corporation Commission). The Cities are entitled to 11th Amendment protection as "arms" of the state and private parties, such as Classic, may not sue them in cases filed at the FCC. *Alden v. Maine*, 527 U.S. at 756; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-03 (1979); *Jones v. Washington Metropolitan Area Transit Authority*, 205 F.3d 428, 432 (D.C. Cir. 2000) (local "performance of governmental functions" are covered by the immunity protection). Because § 253 authorizes the FCC to order states to regulate interstate commerce, an authorization which violates the principle of federalism, *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992), and because Congress may not abrogate sovereign immunity through exercise of its commerce power, *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S.Ct. at 962, § 253 is not a proper abrogation of state sovereign immunity. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 27-32.

The Supreme Court has determined that "'a case is moot when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome'" and the federal courts have an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 278. The Cities certainly have a continuing interest in the Federal government's ability to block their exercise their police powers and to require them to enact a Federal program through § 253 and The Cities remain interested in preventing Federal suits brought against them by private parties in violation of the Eleventh Amendment.

C. The FCC's Selective Use of Vacatur

The circuit court's orders overlook The Cities' argument that

> parties before Federal courts may not avoid the consequences of their actions by deliberately acting to moot the case on appeal. *Northwest Pipeline Corporation v. FERC*, 863 F.2d 73, 79 n. 9 (D.C. Cir. 1988). Vacatur is a remedy applied when a case becomes moot; vacatur is not a litigation tool by which the Federal agencies may avoid judicial review while still binding the petitioning parties to the contested regulatory regime.

See The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 10, The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9. Not only is the FCC using vacatur as a tool to moot The Cities case, the FCC is selectively employing the vacatur remedy to reach that result.

While the FCC is not bound by Article III case and controversy rules, *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995), the FCC's selective application of the vacatur remedy instantly as a tool to defeat Petitioners' effort to obtain judicial review raises serious Fifth Amendment Due Process and Equal Protection

concerns through the FCC's use of vacatur.[13] The circuit court failed to discuss The Cities' argument that the FCC selectively employed the vacatur remedy in this case merely to obtain the dismissal of the instant action, while the FCC has not used the vacatur remedy in other "moot" cases. *See* The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 10; The Cities January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 8. The circuit court does not explain why it permitted the FCC's unreasoned departure from its policy of issuing § 253 preemption orders regardless of mootness. *See RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (the court upheld the FCC's finding that the FCC can preempt a state regulation even if the case at the FCC has become moot); *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227, 16233 ¶ 13 (FCC 2000) (preempting a Kansas universal service fund statute which had been replaced by the time the FCC issued the order); *TCI Cablevision of Oakland County, Inc.* is yet another case in which the FCC issues legal determinations regarding § 253 even though § 253 is not pertinent to the resolution of that case. *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21399 ¶¶ 7-8.

The FCC's policy at this time seem to be to control state action by issuing § 253 pronouncements in cases which are moot for the purposes of obtaining judicial review, but which are nevertheless binding upon The Cities and other State actors. Indeed, the FCC was happy to have the same thing happen to the instant case until, at least, it received service of The Cities' *Initial Brief* in Nos. 96-1432, 99-1521, which discussed, *inter alia*, the FCC's determination that § 253 allows the regulation

---

[13] Instantly, the FCC did not even seek to vacate the challenged orders until years after they were issued and only after receiving service of Petitioners' September 27, 2000 *Initial Brief* which appears to have been the catalyst to the FCC's action.

of state and local governmental processes even if those processes do not affect interstate telecommunications services. *Preemption Order*, 11 FCC Rcd. 13094 ¶ 23; Apdx. 21a. Obviously, the FCC cannot issue orders to state and local governments to compel them to regulate in a prescribed manner, *see e.g.*, *Printz v. United States*, 521 U.S. 898, 930 (1997); *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992), and just as obviously the Federal government cannot regulate purely local activities. *See Lopez v. United States*, 514 U.S. 549, 558-59 (1995) (Federal commerce authority is the power to regulate activities substantially affecting interstate commerce); *Alden v. Maine*, 527 U.S. 706, 739 (1999) (Federal power limited to those "'expressly given, or given by necessary implication'" citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)).

X. CONCLUSION

The FCC succinctly stated in its December 19, 1996 *Emergency Motion for Expedited Review*, No 96-1432, at 2-3, that

> Petitioners' continuing failure to reconsider Classic's franchise applications has improperly impeded Classic from providing competitive telephone service in [The Cities]. . . . [A] swift and authoritative judicial ruling on the respective rights and obligations of the FCC, states, and municipalities under section 253 would help prevent any unnecessary conflict between the FCC and state and local officials in the future.

The need for an authoritative ruling regarding the FCC's authority to hear cases filed by private parties against states and to order states to enact and administer a federal regulatory program under threat of fines, loss of local governmental power, and other penalties is no less important today than it was five years ago. However, rather than seeking an authoritative ruling, the FCC has changed course to shield its

§ 253 rulings, including the decisions at issue instantly, from judicial review.

Given the FCC's decision to regulate § 253 by stealth, given the requirement that The Cities must enact a Federal regulatory program or face penalties for failing to do so, given the FCC's determinations that it may regulate local governments' franchising processes and intrude into that purely local matter, and given the FCC's determination that it can hear suits against states brought by private parties, this case is not moot and The Cities have an interest in receiving a ruling on the questions presented in their appellate case. The FCC's selective application of the vacatur remedy instantly merely to obtain dismissal on mootness grounds violates The Cities' due process and equal protection rights by denying them an opportunity to contest Federal requirements which cabin their police powers and which compel their attendance in a Federal forum to face suits where Eleventh Amendment sovereign immunity has not been waived.

Because Classic's decision to withdraw from the FCC proceeding and the FCC's *Vacatur Order* are voluntary actions, and because the *Vacatur Order* was entered for the express purpose of mooting this case, the case cannot be found to have become moot and The Cities respectfully request that the Court grant Certiorari.

Respectfully submitted,

Timothy E. Welch
Counsel of Record
Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
202-775-0070/202-775-9026 (FAX)
Counsel for Petitioners